No. 16101

United States Court of Appeals

For the Ninth Circuit

HENRY H. BARRETT,

Appellant,

vs.

IOWA NATIONAL MUTUAL INSURANCE COMPANY, a corporation,

Appellee.

Brief of Appellee

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STATEMENT OF ISSUE INVOLVED

A single, sudden, unintentional, uninterrupted, continuous fire completely destroyed the Barrett Building within two hours from the time it commenced. Property owned by several different tenants was destroyed in the one fire. The several tenants commenced tort actions for damages against the appellant, and the several claims were settled for a total payment of $5,000.00, of which sum appellant paid $4,000.00 and appellee paid $1,000.00. Appellant alleges, and appellee denies, that under its policy of insurance the appellee was obligated to pay the

full sum of $5,000.00. We submit that the true issue involved in this case is:

> Is the policy limit for all property damage sustained in a single, uninterrupted, continuous fire, resulting from alleged negligence of the appellant governed by the limit specified in the declarations of "$1,000.00 for each accident"; or is the limit of "$1,000.00 for each accident" a limit of "$1,000.00 for each person sustaining damages in the single fire"?

Appellant makes the same claim made in the litigated cases that if all the property destroyed were owned by one tenant, there would be no question involved, there would then be one accident and the policy limit would be $1,000.00, but that since several tenants were involved, there was more than one accident, and the limit is $1,000.-00 for each person damaged, rather than $1,000.00 for each accident. The weight of authority refutes appellant's contention.

We agree with the statement in appellant's brief that there are no controlling Montana decisions. We concede the soundness of the rules of law with respect to ambiguity set out in the Montana cases cited in appellant's brief, but they are not applicable or pertinent to the issue in this case. The same argument was advanced and reviewed in the litigated cases constituting the weight of authority on the issue involved. A late Montana decision expresses the same views with respect to the rule of ambiguity as contained in the case decisions constituting the weight of authority on the issues involved.

We submit that in the absence of controlling deci-

sions in the State of Montana, or by the Ninth Circuit, that this court should give great weight to the construction on Montana law by the trial court, particularly when it does coincide with and represent the weight of authority.

ARGUMENT

The following decisions represent the weight of authority:

St. Paul-Mercury Indemnity Company v. Rutland, 5th C.C., 225 F. (2d) 689; (Definition of accident reaffirmed in Irby v. Republic Creosoting Co., 5th C.C., 228 F. (2d) at 197;

Denham v. LaSalle-Madison Hotel Company, 7th C.C., 168 F. (2d) 576, certiorari denied 69 S. Ct. 167;

Tri-State Roofing Company v. New Amsterdam Casualty Company, D.C., W.D. Pennsylvania, 139 F. Supp. 193;

Truck Insurance Exchange v. Rohde, Washington, 303 P. (2d) 659;

Hyer v. Inter-Insurance Exchange, California, 246 Pac. 1055.

In his brief, appellant refers to several Montana cases with respect to the general rule that the law of Montana should be resorted to, to interpret this contract, and that ambiguous contracts of insurance will be construed and doubts resolved in favor of the insured and against the insurer. We have no quarrel with those cases, nor with the rules stated therein. The language in this policy "each accident" is not ambiguous, and the cases cited by the appellant are simply not applicable. In this con-

nection, the Montana Supreme Court said in the case of *James v. Prudential Insurance Company of America, 312 P. (2d) 125,* in a unanimous opinion decided May 22, 1957:

> "The plaintiff urges a number of cases to the effect that an uncertain contract should be interpreted most strongly against the party causing the uncertainty. Such is the Montana rule. R.C.M. 1947, Sec. 13-720. But even though it is a cardinal principle of insurance law that a contract of insurance is to be construed liberally in favor of the insured and strictly against the insurer, contracts of insurance should be given a fair and reasonable construction. (Citing case.) In arriving at such construction, no matter how strictly construed against the insurer, the intention of both insurer and insured is to be ascertained from the language of the policy. R.C.M. 1947, Sec. 13-704. Effect must be given to every part of the policy contract. R.C.M. 1947, Sec. 13-707. *The words of the contract are to be understood in their usual meaning.* R.C.M. 1947, Sec. 13-710. Common sense controls." (Emphasis supplied.)

The same basic rules quoted from the *James* case were applied by the California court in the case of *Hyer v. Inter-Insurance Exchange,* by the Washington Court in the case of *Truck Insurance Exchange v. Rohde,* and by the Fifth Circuit Court in the case of *St. Paul-Mercury Indemnity Company v. Rutland.*

In the Washington case, for example, the court stated that the words of the contract which are the basis of the litigation, and the meaning of which the court was required to determine, were "accident" and "occurrence." The court stated that for the purpose of the case the terms

were synonymous, and since they were not defined in the contract:

> " * * * we must determine their popular and ordinary meaning." *(Pp. 661.)*

After pointing out that the common understanding contemplated that all damages sustained within the confines of a single, continuous, and uninterrupted act constituted a single act or occurrence, the court said:

> "We are of the opinion, from reading the contract as a whole, that the language used is not ambiguous, and that the intention of the parties and what they desired to accomplish are clearly expressed therein. The words 'accident' and 'occurrence' are words of common usage and, in and of themselves, are not ambiguous. An ambiguity will not be read into a contract." *(Pp. 664.)*

In *St. Paul-Mercury Indemnity Company v. Rutland,* the court said:

> "It is true that Georgia also follows the general rule which decrees that all ambiguities in an insurance contract shall be construed most favorably to the assured. However, the words used must be given their usual and ordinary meaning, and we may not strain their construction in order to perceive ambiguities. (Citing cases.)
>
> "The only limit expressed in the policy for automobile property damage liability is the disputed phrase '$5,000.00 each accident.' It can hardly be denied that when ordinary people speak of an 'accident' in the usual sense, they are referring to a single, sudden, unintentional occurrence. They normally use the word 'accident' to describe the *event,* no matter how many persons or things are involved." *(Pp. 691.)*

Our Montana statutes, of course, were adopted from those in California. After stating that the terms used in

an insurance policy should be given their plain, ordinary, and popular meaning, the California court in *Hyer v. Inter-Insurance Evchange,* discussed the meaning of the word "accident" and then said:

> "Where, as here, one negligent act or omission is the sole proximate cause, or cause causans, there is, as a general rule, but one accident, even though there be several resultant injuries or losses. Let us suppose that in the instant case the owner of the Overland car had likewise been the owner of the Cadillac, and that the former vehicle had been towing the latter when the successive but casually connected collisions occurred—just as each car in a freight train pulls the car which is immediately behind it. Could it correctly be said in the case just supposed that there were two accidents, merely because two automobiles were damaged in sudden and unexpected crashes happening in continuous sequence as a connected chain of events, but springing from a single initial cause? Clearly not. It would no more be correct to say of such a case that there were two accidents than it would be to predicate two or more accidents on a general freight train wreck, merely because two or more cars in the train might have been demolished in the same catastrophe. If, in our suppositious case, there would be but one accident, though two automobiles belonging to the same person were injured, then how could that accident become two accidents merely because, under the facts of this case, the two injured vehicles were separately operated and owned? To ask the question is to answer it." *(Pp. 1057.)*

In *Tri-State Roofing Company v. New Amsterdam Casualty Company,* the District Judge in the Pennsylvania court had involved the same identical fact situation as we have in this Barrett case. The same policy provisions were likewise involved. Initially, on the strength

of the first opinion in *St. Paul-Mercury Indemnity Company v. Rutland,* the court held as now contended by appellant in this case. On rehearing, the court said:

> "Subsequently, on April 26, 1955, counsel for defendant filed a motion to amend or set aside the opinion and for a rehearing. The opinion of this court was referred to wherein a decision of the Court of Appeals for the Fifth Circuit, Saint Paul-Mercury Indemnity Co. v. Rutland, decided December 15, 1954, No. 15184, was cited. Defendant recited the fact that on March 22, 1955 the Court of Appeals for the Fifth Circuit granted a rehearing. As this court had relied on the foregoing decision, which was favorable to the plaintiff in this case, an order was entered on May 12, 1955 by this court staying all proceedings and continuing this case generally, as this court desired to have at the final argument, the benefit of the final decision of the Court of Appeals in the case mentioned. The final decision in that case was filed on August 24, 1955, 225 F. 2d 689, rehearing denied October 3, 1955. * * *
>
> "The issues were thereafter re-argued before me at the October term. *It now convincingly appears that the weight of authority favors the defendant in this case.* The opinion as filed speaks for itself and expresses the views of this court at the time it was written. However, a study of the issues and authorities after re-argument of the case and especially upon consideration of the opinion of the Court of Appeals for the Fifth Circuit, filed August 24, 1955, this court has concluded that the decision reached in the opinion was incorrect. This court must, therefore, vacate and set aside the opinion heretofore filed and direct that judgment be entered for the defendant. It will be so ordered." *(Pp. 198.* Emphasis supplied.)

Appellant's brief cites and quotes portions of the article in *55 A.L.R. (2d) 1300.* It does not quote the following pertinent statement. Under Section 3, titled Summary and comment, it is stated:

> "The majority of the courts take the viewpoint that the 'per accident' clause is to be construed from the point of view of the cause of the accident rather than its effect." *(Pp. 1303.)*

Under sub-paragraph (b) of the same Section 3, the annotator said in part:

> "The trend of authority definitely is toward the adoption of the viewpoint that the limitation provision provides for a maximum of liability for all injuries and damages proximately resulting from one uninterrupted and continuing cause. The courts seem particularly impressed by the fact that an opposite rule may easily expand the stated limit in the policy into indefinite and larger amounts than the ones on which the premiums were based when a chain reaction or an accident series develops.
>
> "Up to 1955, the chances of several persons damaged or injured through one negligent act of the insured to have their individual claims considered as each covered up to the policy limit were fairly good. Since then, the chances have become slim. The turning point probably is the case of St. Paul-Mercury Indem. Co. v. Rutland (1955, CA5th Ga.) 225 F. 2d 689, which, while expressly distinguishing Anchor Casualty Co. v. McCaleb (1949, CA5th Tex.) 178 F. 2d 322, a decision coming from the same Court of Appeals must, for practical purposes, be considered as overruling it." *(Pp. 1303.)*

Likewise, under sub-section (c) of the same Section 3, the annotator proposes a suggested test. The suggested test is, of course, the same test basically applied by the courts in the cases cited and referred to above, and under that suggested test, the judgment of the trial court for appellee should be affirmed.

On page 8 of appellant's brief, is the statement that

at the time the policy before the court was written, the only definitive case precisely deciding the question in this action was *Anchor Casualty Company v. McCaleb, 178 F. (2d) 322 (C. A. 5th, 1948).* This is neither a fair statement, nor an accurate statement.

In the first place there was in full force and effect at that time when this policy was written the decision of the California court in *Hyer v. Inter-Insurance Exchange, 246 Pac. 1055,* which is particularly persuasive to a Montana court because of the fact that our statutes were adopted from California. In addition, there was the decision of the Seventh Circuit Court in *Denham v. LaSalle-Madison Hotel Company, 168 F. (2d) 576,* which is far closer in point of fact than the decision of the Fifth Circuit Court in *Anchor Casualty Company v. McCaleb.*

In the second place, the *Anchor Casualty-McCaleb* case is distinguishable in fact and is not controlling. The distinction in fact is well set out in *St. Paul-Mercury Indemnity Company v. Rutland,* in *Truck Insurance Exchange v. Rohde,* and the annotator in *55 A.L.R. (2d)* states that for practical purposes, it must be considered that the *St. Paul-Mercury Indemnity Company v. Rutland* case overrules *Anchor Casualty Company v. McCaleb.* In that case, there were a series of interrupted, intermittent blowouts at a well. When one blowout occurred, the wind might be blowing in one direction. At a later blowout, the wind was blowing in another direc-

tion. These several and different blowouts, each one affecting different areas in space, occurred over a period of some fifty hours, and the court very properly considered them as separate accidents.

Furthermore, that the skilled lawyers appellant complains about, who write these policies, did not consider the *Anchor Casualty Company-McCaleb* case to affect the situation is reflected by a discussion in *Volume XXIII, Insurance Counsel Journal,* April, 1956, Pp. 194, entitled "When Does an Accident Become Two Accidents?", the author first discusses the case of *Anchor Casualty Company v. McCaleb,* and then says in connection with it:

> "The question was whether more than one 'accident' was involved. In a 2-to-1 decision the court held that each eruption constituted a different event and that multiples of the 'per accident' limit should apply, subject to the aggregate limit of $25,000. When this decision was handed down, it was the subject of considerable study by insurers and defense attorneys, who were fearful that such reasoning would be destructive of the standard limits of liability provisions. However, it finally was concluded that under all the circumstances no immediate policy revision (a most expensive procedure) should be undertaken. The great probability appeared to be that the decision would not be viewed as a general precedent, but would be held by other courts to the unusual factual circumstances presented in the specific case." *(Pp. 194.)*

The author of the article then discusses in detail the decision of the Fifth Circuit Court in *St. Paul-Mercury Indemnity Company v. Rutland;* followed by a discussion of the *Tri-State Roofing Company v. New Amsterdam*

Casualty Company; followed by a discussion of *Truck Insurance Exchange v. Rohde;* a discussion of the California case of *Hyer v. Inter-Insurance Exchange,* and a discussion of the case of *Denham v. LaSalle-Madison Hotel Company.* In conclusion, the author of the article states:

"Conclusion

"The decision finally reached by the United States Court of Appeals for the Fifth Circuit in the Rutland case represents, it is submitted, not only the underwriting intent but also a proper construction of the contract and any others which are similar. To hold otherwise is to attribute to the contracting parties an intent that when an accident occurs, the extent of an insurer's liabiliy does not depend upon the injuries, or the damage which has occurred and the amount of insurance purchased by the insured, but rather is determined by how many persons may happen to be claimants. In the *Rutland* case, for example, under the plaintiff's reasoning the insured would have possessed only $5,000 worth of protection (the amount for which he paid a premium) if the railroad had owned all the damaged property. However, by reason of the fact that various persons happened to own portions of that property and decided to sue the insured, the elastic policy would have expanded to provide $30,000 in protection. No provision in any standard form in recent years would support such an unrealistic construction. Every consideration would indicate that the parties to a standard policy make a normal, common-sense contract under which the insured decides to purchase and pay for a definite amount of protection with respect to what all reasonable persons would regard as one accident. To argue otherwise is simply an attempt by an insured to expand the policy by artificial construction so as to obtain additional free insurance at the expense of fellow policyholders." *(Pp. 198.)*

CONCLUSION

We respectfully submit that the weight of authority including decisions from California, Washington, the Fifth Circuit Court, and the Seventh Circuit Court, requires an affirmance in this case that the single, sudden, unintentional, continuous, uninterrupted fire which destroyed the Barrett Building, constituted a single accident for which the express limit of liability in the policy was a total of $1,000 for the property damage sustained by all the claimants; that there are no controlling Montana decisions, and the decision of the trial court construing what the Montana law would be under these facts coincides with the weight of authority; and the judgment in favor of the appellee and against the appellant should be affirmed.

Respectfully submitted,

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